No. 07-173

IN THE

Supreme Court of the United States

AHMED BELBACHA, PETITIONER

v.

GEORGE W. BUSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

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The Court should grant review and defer briefing pending disposition of *Boumediene v. Bush*, Nos. 06-1095 & 06-1096. Such action would discourage the government from transferring petitioner to Algeria, thereby mooting the case, before the Court has had an opportunity to resolve the jurisdictional question. The very pendency of the petition apparently has discouraged the government from transferring petitioner to Algeria thus far.

1. Certiorari before judgment is appropriate because the court of appeals has already decided that its decision in *Boumediene* bars it from granting relief. See Pet. 2-3, 6-7; Pet. App. A6. Contrary to the government's claim, petitioner does not contend that certiorari before judgment is appropriate "whenever full review by a court of appeals seems futile." Br. in Opp. 5. Certiorari before judgment is appropriate here because (1) the questions presented are certworthy, (2) the court of appeals has already decided that it lacks jurisdiction even to *consider* the questions presented, (3) seeking *en banc* consideration of the jurisdictional issue would be pointless,[1] and (4) it is appropriate for the Court to preserve the *status quo* pending its determination of the jurisdictional issue.

The government argues that the Court should not even hold the petition because the court of appeals will be able to apply the Court's decision in *Boumediene* "without the need for action by this Court." Br. in Opp. 10. The government, however, does not repre-

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[1] See *Hamdan v. Gates*, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam) (deferring consideration of Hamdan's suggestion for initial hearing en banc pending this Court's disposition of *Boumediene*).

sent that it would refrain from transferring petitioner to Algeria pending the Court's disposition of *Boumediene*. Action by this Court is necessary to ensure that the court of appeals will be able to apply *Boumediene* to this case.

2. The government denies that the circuits are split over the proper standards for preliminary relief, but the government offers no analysis to support its position. See Br. in Opp. 10-11. Instead, the government simply repeats its contention that the MCA stripped the courts of jurisdiction to grant petitioner preliminary relief. *Id.* Whether the MCA validly did so is one of the questions before the Court in *Boumediene*. The government also contends that separation-of-powers principles bar the relief sought by petitioners. *Id.* at 6-8. That question, too, is intertwined with the questions in *Boumediene*.

3. The government's contention that the MCA divested the courts of jurisdiction to grant relief here also begs the third question presented by the petition—whether the court of appeals had jurisdiction to preserve the *status quo* pending this Court's resolution of *Boumediene*. Pet. (ii). District Judge Kessler addressed that very question in an order on October 2, 2007, barring the government from transferring a Guantánamo prisoner to Tunisia pending resolution of *Boumediene*. *Alhami v. Gates*, Civ. No. 05-359 (D.D.C. Oct. 2, 2007) (Ex. A). Judge Kessler concluded the preliminary relief was warranted because the petitioner had "presented evidence that he would face a serious threat of torture if rendered to a Tunisian prison," Order at a3, and this Court's grant of certiorari in *Boumediene*, coupled with the court of appeals' recall of its mandate in the case, "cast a

deep shadow of uncertainty" over the jurisdictional ruling of the court of appeals, *id.*, at a6. Judge Kessler stated: "Given this procedural posture, and the dire irreparable harm Rahman fears, it is imperative that the Court protect its jurisdiction until the Supreme Court issues a definitive ruling in *Boumediene*." *Id.* Judge Kessler further stated:

> In view of the grave harm Rahman has alleged he will face if transferred, it would be a profound miscarriage of justice if this Court denied the Motion based on the Court of Appeals' decision in *Boumediene* and the Supreme Court later reversed or modified that decision. At that point, the damage would have been done. As then-Chief Judge Wald observed regarding an appeal of a district court injunction, a justice system that did not allow courts to "provide interim relief to ensure the survival in the coming months of the alien claimants in this case" pending the Supreme Court's decision in a separate controlling case would be "a cruel and irrational system of justice indeed." *Ayuda* v. *Thornburgh*, 919 F.3d 153, 154, 156 (D.C. Cir. 1990) (Wald, C.J., dissenting).

Id., at a7.

5. The government's other arguments are equally without merit. Contrary to the government's contention, Br. in Opp. 9, petitioner indeed seeks "core" habeas relief – release from detention. This case involves *terms* of his release, specifically, whether the government may release petitioner into the hands of those would likely torture or even kill him. The government is similarly incorrect in its contention that *Ex parte Quirin*, 317 U.S. 1 (1942), and *Barefoot* v.

Estelle, 463 U.S. 880 (1983), are inapposite because the petitioners there faced execution, and petitioner here does not. Petitioner maintains that torture is a near-certainty, and execution a substantial possibility, if the government is allowed to transfer him from Guantánamo to Algeria. Pet. 3-5.

CONCLUSION

The petition should be granted and briefing deferred pending disposition of *Boumediene*.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RAFIQ BIN BASHIR BIN JALLUL ALHAMI et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

Civil Action No. 05-359 (GK)

MEMORANDUM ORDER

This matter is before the Court on Petitioner Mohammed Rahman's Motion for Preliminary Injunction Pursuant to FRCP 56(a).[2] Upon consideration of the Motion, Opposition, Respondents' Supplemental Statement, Petitioner's Brief on Jurisdiction, Respondents' Opposition, Petitioner's Reply, and the entire record herein, and for the reasons stated below, Petitioner's Motion for Preliminary Injunction is granted.

Petitioner Rahman ("Rahman") is a Tunisian citizen allegedly captured by Pakistani bounty hunters

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[2] Petitioner's Motion also requested a temporary restraining order. The Court previously granted that portion of the Motion.

and transferred to the custody of the United States on an undisclosed date. He has been detained in Guantanamo Bay since shortly after his capture. Rahman maintains that Combatant Status Review Tribunal ("CSRT") proceedings have never resulted in any finding that he is an "unlawful" enemy combatant.[3] On May 15, 2007, the Government provided notice to Petitioners and the Court of its intention to transfer Rahman out of Guantanamo Bay and release him to the Government of Tunisia.

A 20-year prison sentence awaits Rahman in Tunisia. The Tunisian Government promulgated the Tunisian Patriot Act in 2003,[4] nearly two years after Rahman was captured and detained by the United States. Rahman was prosecuted, in absentia, in Tunisia in 2005 for violations of the newly-enacted Tunisian Patriot Act, and was convicted and sentenced to 20 years' imprisonment. Rahman's ex poste facto prosecution and conviction, he contends, offend the norms of the United States Constitution as well as international law. He further maintains that the Tunisian Government passed the Tunisian Patriot Act at the behest of the United States Government, and

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[3] The Government points out that a CSRT proceeding resulted in a finding that Rahman was an enemy combatant, although it does not expressly dispute Rahman's statement that the CSRT never found him to be an "unlawful" enemy combatant.

[4] The Tunisian Patriot Act is alleged to be similar to the USA Patriot Act of 2001. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

that his prosecution pursuant to that Act was based solely on the very evidence which led to his detention in Guantanamo, but was deemed insufficient to hold him as an unlawful enemy combatant. The fact that he has been cleared by the United States Government raises serious doubts about his Tunisian conviction. Moreover, he contends that the United States Government knew of his prosecution in Tunisia and did nothing to inform him, thereby ensuring that he would be deprived of any opportunity to defend himself.

Rahman suffers from serious health problems. His aortic heart valve was replaced when he lived in Italy, and he has an intracardiac pacemaker and a stent. He experiences frequent chest pains and intense heart palpitations. His kidney problems, urinary problem, and joint problems cause him severe pain. Rahman also suffers from chorea, rheumatic fever, uncompensated congestive heart failure, hypertension, anxiety, depression and fatigue. In light of those health problems, Rahman argues that transfer to Tunisia, which will result in his imprisonment, amounts to a death sentence because he will not receive adequate treatment. Tunisian prisons have been cited by the United Nations High Commission on Human Rights as having "inhuman living conditions."

Rahman has presented evidence that he would face a serious threat of torture if rendered to a Tunisian prison. He cites to reports of international organizations that document torture of prisoners and police brutality in Tunisia. Rahman's serious health problems, his Tunisian ex poste facto conviction in absentia, and his allegations of the indiscriminate

use of torture in Tunisian prisons demonstrate the devastating and irreparable harm he is likely to face if transferred.

On June 29, 2007, the Supreme Court granted certiorari to review the merits of our Court of Appeals' decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) ("*Boumediene*"). *Boumediene v. Bush*, 127 S. Ct. 3078, 2007 WL 1854132 (2007); *Al Odah v. United States*, 127 S. Ct. 3067 (2007). The petitions for certiorari challenge, *inter alia*, the Court of Appeals' decision that aliens captured or detained by the United States outside of the United States do not have a constitutional or common law right to challenge their detentions via habeas corpus petitions. *See* Petition for a Writ of Certiorari at i, *Al Odah v. United States* (No. 06-1196)). The resolution of that question is likely to directly affect the outcome of the instant case.

The Supreme Court's decision to grant certiorari in *Boumediene* constituted a reversal of its previous denial of certiorari. Such reversals are rare. To grant certiorari on rehearing requires the votes of five justices, not just the four required to grant certiorari on an initial application. See Sup. Ct. R. 44.1. Although the agreement of five justices on certiorari certainly does not predict the outcome on the merits, it does demonstrate the Supreme Court's recognition of the importance of the case. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). Rule 10 of the Supreme Court Rules provides for a grant of certiorari where "an important question of federal law that has not been, but should be, settled by th[e Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e Supreme]

Court."[5] The extraordinary grant of certiorari on rehearing indicates the Supreme Court's view that this case raises an important federal question, and that there is a need for comprehensive and thorough reexamination of the Court of Appeals' decision.

The Government responds that despite the Supreme Court's grant of certiorari, the Court of Appeals' decision in Boumediene controls until the Supreme Court has ruled. However, the Court of Appeals' decision, on July 27, 2007, to affirmatively withdraw the mandate in *Boumediene* suggests, at a minimum, the Court of Appeals' inclination to await the Supreme Court's final ruling.

In addition, it is well-settled that an appellate decision is not final until the mandate is issued. Fed. R. App. P. 41(c) advisory committee's note, 1998 amendment ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed."). Absent a mandate, whether because it has not yet issued or because it has been withdrawn, the court of appeals retains jurisdiction and the decision may be modified or rescinded. *See Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978). Recalling the mandate sends a strong signal that the decision may well be modified or rescinded, and deprives a previously final decision of its finality. *See Calderon v. Thompson*, 523 U.S. 550, 557-58 (1998).

When these two factors–the Supreme Court's highly unusual grant of certiorari on rehearing and

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[5] The two other Rule 10 considerations are not applicable to this case.

the Court of Appeals' withdrawal of the mandate in *Boumediene*–are considered together, they cast a deep shadow of uncertainty over the jurisdictional ruling of that decision. Given this procedural posture, and the dire irreparable harm Rahman fears, it is imperative that the Court protect its jurisdiction until the Supreme Court issues a definitive ruling in *Boumediene*.

It is well-settled that this Court has jurisdiction to determine its own habeas jurisdiction. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *United States v. Ruiz*, 536 U.S. 622, 627 (2002) ("[A] federal court always has jurisdiction to determine its own jurisdiction."). The Court also has the related power, pursuant to the All Writs Act, 28 U.S.C. § 1651, to "issue all writs necessary or appropriate in aid of [its] jurisdiction . . . ." *See also United States v. United Mine Workers*, 330 U.S. 258, 290 (1947) ("[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."). Our Court of Appeals has already declined to vacate decisions of this District Court granting such interim relief. *See Al Ginco v. Bush*, No. 06-5191, slip op. at 2 (D.C. Cir. June 7, 2007). That consolidated appeal considered the decision of a judge of this District Court to issue a 30-day notice order in order to protect the court's jurisdiction. Significantly, our Court of Appeals considered the validity of that 30-day notice order after issuance of its decision in *Boumediene*, and it declined to vacate the District Court ruling. *See id.* It may be inferred from that ruling that the Court has the power to grant the injunction re-

quested in this case to preserve the status quo pending the Supreme Court's decision in *Boumediene*.

In view of the grave harm Rahman has alleged he will face if transferred, it would be a profound miscarriage of justice if this Court denied the Motion based on the Court of Appeals' decision in Boumediene and the Supreme Court later reversed or modified that decision. At that point, the damage would have been done. As then-Chief Judge Wald observed regarding an appeal of a district court injunction, a justice system that did not allow courts to "provide interim relief to ensure the survival in the coming months of the alien claimants in this case" pending the Supreme Court's decision in a separate controlling case would be "a cruel and irrational system of justice indeed." *Ayuda v. Thornburgh*, 919 F.3d 153, 154, 156 (D.C. Cir. 1990) (Wald, C.J., dissenting).

Finally, the Government suffers absolutely no harm from entry of the Preliminary Injunction, whereas the failure to grant Rahman the interim relief he seeks—relief necessary to ensure his survival until the Supreme Court rules—would be irremediable if Boumediene is reversed.

Accordingly, it is hereby

ORDERED that Petitioner's Motion for Preliminary Injunction

Pursuant to FRCP 56(a) is granted.

/s/

October 2, 2007 Gladys Kessler

United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAFIQ BIN BASHIR BIN JALLUL ALHAMI, et al.,

Petitioners,

v. **Civil Action No. 05-359 (GK)**

GEORGE W. BUSH, President of the United States, et al.,

Defendants.

ORDER

On October 2, 2007, this Court issued an Order asking if there were any objections to the unsealing and public filing of the Court's Memorandum Order in this case. On October 5, 2007, Respondents filed a Response stating they had no objection.

WHEREFORE, it is this 9th day of October, 2007, hereby

ORDERED, that the Clerk of Court shall unseal and file on the public docket the Court's Memorandum Order of October 2, 2007.

/s/

Gladys Kessler

United States District Judge